



2024:DHC:6303



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on: 06.08.2024

Judgment delivered on: 21.08.2024

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CM(M) 131/2024 & CM APPL. 4130/2024

M/S. AKN DEVELOPERS PRIVATE LIMITEDPetitioner

versus

M/S. PREMSONS SOUTHENDRespondent

Memo of Appearance

For the Petitioner: Mr. Ravi Gupta, Senior Advocate with Mr. Akhil Sachar, Mr. Rajeev Bansal, Ms. Muskaan Mehra, Ms. Kashish and Sunanda, Advocates

For the Respondent: Mr. Tanmay Mehta and Mr. Nikhil Palli, Advocates

CORAM:

HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

MANOJ JAIN, J

1. The question posed is whether the counter-claim is arbitrable or not.

2. For the sake of convenience, I would be referring to the parties as per their nomenclature before the Arbitral Tribunal and, therefore, petitioner M/s AKN Developers Private Limited would be referred to as 'claimant' and M/s Premsons Southend would be referred to as 'counter-claimant'.

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By: SONIA TAPLIYAL
Signing Date: 21.08.2024
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3. There was a lease deed between the parties which was executed on 26.03.2021.
4. As per such lease deed, claimant had inducted counter-claimant as its lessee in the *first floor* of Property No. F-39, South Extension Part-1, New Delhi and such first floor was given on lease for a fixed period of three years. Monthly rental was fixed as Rs. 3 lacs for the first eighteen months and Rs. 3.50 lacs for the later duration of eighteen months. Various other terms & conditions were also agreed upon by them with respect to the above said lease.
5. Be that as it may, presently, we are concerned about the ‘arbitration clause’ contained in such agreement. It is in Clause 6 of the agreement which reads as under: -

“That the parties have agreed to attempt in good faith to resolve any disputes/differences or claim arising out of or in relation to this Agreement through mutual discussion. In case it is not resolved within 30 days from the date of receipt of the written notice (setting out dispute or claim), by the other party, the complaining party may issue a notice of reference, invoking settlement of such dispute through sole arbitration, to be mutually appointed by the parties. Any dispute relating to construction, managing, scope, operation or effect of this Agreement or the validity or the breach thereof be referred to and finally and conclusively settled by mutually appointed sole arbitrator, in accordance with law in effect in India governing the arbitration. The place of arbitration shall be at New Delhi.”

6. A legal notice on 05.11.2021 was issued by the claimant stating therein that the counter-claimant was running a shop on the ground floor of the demised premises and since they were desirous of extending their



such business, they approached claimant expressing their desire of taking on lease the first-floor measuring 1400 square feet and relying upon such representation, lease deed was executed with respect to the demised premises i.e. first-floor. It was also mentioned in the notice that counter-claimant was already in possession of the demised premises during the execution of the above lease deed dated 26.03.2021 and that counter-claimant had, arbitrarily and unilaterally, stopped the payment of monthly rent towards demised premises since June 2021 and that the default in payment of monthly rent was for more than two consecutive months which was in violation of Clause 4(v)(a) of said lease deed.

7. Another notice was sent on 29.12.2021 for invocation of arbitration reiterating the above said facts all over again.

8. Eventually, claimant filed a petition under Section 11 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as '*A&C Act*') praying therein that arbitrator be appointed.

9. Counter-claimant appeared in such petition i.e. Arbitration Petition No. 223/2022 and though disputed the averments made in the notice but admitted as to the existence of arbitration agreement.

10. Resultantly, vide order dated 02.05.2022, the Sole Arbitrator was appointed to adjudicate the dispute between the parties.



11. Pursuant thereto, claimant filed its statement of claim dated 08.06.2022 before the learned Sole Arbitrator. Statement of Defence (SoD) thereto was filed by the counter-claimant on 23.07.2022.

12. So far so good.

13. The controversy has arisen after counter-claimant filed its counter-claim before the learned Sole Arbitrator on 03.08.2022.

14. Before taking up the averments made in the counter-claim, it needs to be seen as to what was the stand of the counter-claimant when it submitted its SoD.

15. On careful perusal of the aforesaid SoD, the crux can be said to be as under: -

- a) *It has been running a shop in the ground floor of demised premises since 1983 via traditional tenancy model in India i.e. pagri system.*
- b) *In 2015, claimant was re-constructing its premises and the counter-claimant, with the objective of expanding its business, entered into an agreement with the claimant and thereby agreed to pay a sum of Rs. 6,41,30,000/- to the claimant for purchasing the first floor and towards such agreement-to-sell and intended purchase, it started making payment of the sale consideration through banking channels.*



- c) *It is in continuous possession of the portion of first floor since the year 2015.*
- d) *Between 19th February, 2015 and 17th July, 2021, it paid a sum of Rs. 5,27,54,000/- to the claimant, details whereof were mentioned in Para-6 of the SoD.*
- e) *Claimant withheld the agreement-to-sell claiming that premises would be registered in the name of counter-claimant upon the payment of the final installment.*
- f) *On account of business losses and pandemic of Covid-19, counter-claimant could not pay balance amount of Rs. 1,17,00,000/- and it approached the claimant and they both entered into an understanding that the counter-claimant may continue to make balance payment of Rs. 1,17,00,000/- in the form of rent and it was with above understanding and objective that the lease deed was executed on 26.03.2021.*
- g) *The intention of claimant became malafide and, therefore, in order to defraud the counter-claimant and to extract more money from the counter-claimant, a false claim has been lodged.*
- h) *While filing such statement of defence, the counter-claimant also claimed that he would seek leave of the Arbitral Tribunal to file a counter-claim as well.*



16. Said SoD was followed by counter-claim and it is very obvious that the averments appearing in both are practically indistinguishable.

17. In such counter-claim, counter-claimant has merely supplemented that he is still ready to abide by the agreement-to-sell and is ready to make balance payment and seeks registration of the said premises in its name and in alternate, in case the aforesaid payment of Rs. 5,33,54,000/- is not acknowledged as sale, the claimant be directed to reimburse the said amount along with interest @ 18% per annum.

18. After the aforesaid counter-claim was lodged, the claimant filed an application under Section 16 of A&C Act seeking rejection of the counter-claim.

19. Such application was resisted by the counter-claimant.

20. Holding that such counter-claim is within the jurisdiction of the Arbitral Tribunal, the learned Sole Arbitrator has dismissed the above application.

21. Such order dated 06.10.2023 is under challenge.

22. As already noticed, the lease deed is with respect to first floor and the alleged agreement-to-sell is also qua the same floor.

23. At the moment, we are not concerned with the ground floor.



24. According to Sh. Ravi Gupta, learned Senior Counsel for the claimant, the learned Arbitral Tribunal has patently erred in not considering the fact that the issue and dispute raised in the counter-claim does not fall within the ‘scope and ambit of arbitration clause as embedded in Clause 6 of the lease deed’. Moreover, since the counter-claimant had acknowledged its status as that of tenant while entering into a lease deed, it, now, cannot be permitted to take a somersault and wriggle out of the same.

25. It is also argued that oral agreement-to-sell which, even otherwise is not in existence, is outside the terms of the lease agreement and thereby beyond of the scope of arbitration. Moreover, the aspect related to ‘specific performance of the contract’ is not covered within the scope of the arbitration as the same is based on some fictitious and sham agreement-to-sell which is not only barred under Section 17(1-A) of Registration Act but also runs contrary to the terms of the registered lease deed. Additionally, such plea of oral evidence is not maintainable and tenable in view of Section 91 & 92 of Evidence Act (*now Section 94 & 95 of Bharatiya Sakshya Adhiniyam, 2023*). The claimant has relied upon *Adwel Advertising Service & Anr. V. South Delhi Municipal Corporation*¹, *Sunil Kapoor v. Himmat Singh & Ors.*², *Asman*

¹ 2018 (5) Arb. LR 281 (Delhi) DB

² 167 (2010) DLT 806



*Investments Ltd. v. K.L. Suneja & Anr.*³ and *Shailendra Nath Endlay & Anr. v. Kuldip Gandotra*⁴.

26. All such contentions have been refuted by Sh. Tanmay Mehta, learned counsel for counter-claimant who has relied upon *Karan Kapoor v. Madhuri Kumar*⁵, *Giriraj Garg v. Coal India Limited and Others*⁶, *Oil and Natural Gas Corporation Limited Vs. AFCONS Gunanusa JV*⁷, *Re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899*⁸, *R. Janakiraman Vs. State represented by Inspector of Police, CBI, SPE, Madras*⁹ and *IDFC First Bank Limited v. Hitachi MGRM Net Limited*¹⁰

27. The broad contentions of counter-claimant can be enumerated as under: -

a) As per the scheme of A&C Act, an order passed under Section 16 of A&C Act is appealable only if the arbitral proceedings are terminated. However, if such plea is rejected, the arbitral proceedings continue and in such a situation, there is no provision of appeal. Reliance has been placed upon *IDFC First Bank Limited v. Hitachi MGRM Net Limited* (supra) to contend that

³ 2011 (124) DRJ 693

⁴ 180 (2011) DLT 769 (DB)

⁵ (2022) 10 SCC 496

⁶ (2019) 5 SCC 192

⁷ (2024) 4 SCC 481

⁸ 2023 SCC OnLine SC 1666

⁹ (2006) 1 SCC 697

¹⁰ 2023 SCC OnLine Del 4052

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when any such order not appealable, the remedy would be only to challenge the same once the final award was passed.

b) Scope of judicial interference under Article 227 of the Constitution of India is very constricted and, therefore, the Court should not interfere in the present matter as such power has to be invoked under exceptional circumstances, which do not exist herein.

c) The averments mentioned in statement of defence have been reiterated in the counter-claim, with the mere addition of consequent prayer.

d) The averments made in the statement of defence and counter-claim are virtually the same and are intrinsically interwoven and these cannot be segregated and, therefore, for all purposes, counter-claim, even otherwise, falls within the scope and ambit of agreement in question.

e) The counter-claim is not based on a different cause of action and rather emanates from the same primary cause.

f) The arbitration clause covers the 'dispute arising out of or in relation thereto' and these words are of very wide multitude and, therefore, needs to be construed accordingly. In this regard, reliance has been placed upon *Giriraj Garg v. Coal India Limited and Others (supra)*.



g) The counter-claimant was earlier in possession of the ground floor and when the property was being re-developed, the counter-claimant expanded its business and thus came in possession of first floor. The present dispute is, admittedly, with respect to the first floor of demised property but fact remains that with respect to the same floor i.e. first floor, there was an 'agreement to sell' followed by huge substantial payment qua sale consideration. All these things cannot be brushed aside at this initial juncture.

28. I have given my anxious consideration to the rival contentions.

29. This court is conscious of the fact that in such type of matters, the judicial interference should be minimal. In *IDFC First Bank Limited v. Hitachi MGRM Net Limited* (supra), there is reference of one Supreme Court judgment which enumerates the situations when such interference might be permissible. In such judgment i.e. *Surender Kumar Singhal & Ors. v. Arun Kumar Bhalotia & Ors.*: 2021 SCC OnLine Del 3708, it is observed that if there is complete lack of jurisdiction in the Arbitral Tribunal, a writ petition would be entertainable under exceptional circumstances. Para 25 of said judgment reads as under: -

“25. A perusal of the above-mentioned decisions, shows that the following principles are well settled, in respect of the scope of interference under Article 226/227 in challenges to orders by an arbitral tribunal including orders passed under Section 16 of the Act.



- (i) *An arbitral tribunal is a tribunal against which a petition under Article 226/227 would be maintainable;*
- (ii) *The non-obstante clause in section 5 of the Act does not apply in respect of exercise of powers under Article 227 which is a Constitutional provision;*
- (iii) *For interference under Article 226/227, there have to be 'exceptional circumstances';*
- (iv) *Though interference is permissible, unless and until the order is so perverse that it is patently lacking in inherent jurisdiction, the writ court would not interfere;*
- (v) *Interference is permissible only if the order is completely perverse i.e., that the perversity must stare in the face*
- (vi) *High Courts ought to discourage litigation which necessarily interfere with the arbitral process;*
- (vii) *Excessive judicial interference in the arbitral process is not encouraged;*
- (viii) *It is prudent not to exercise jurisdiction under Article 226/227;*
- (ix) *The power should be exercised in 'exceptional rarity' or if there is 'bad faith' which is shown;*
- (x) *Efficiency of the arbitral process ought not to be allowed to diminish and hence interdicting the arbitral process should be completely avoided.;*"

30. Since the grievance herein is also qua the jurisdiction i.e. competence to entertain counter-claim, this court is compelled to consider the same, merely to assess whether there is lack of inherent jurisdiction or whether the dispute raised in counter-claim is also arbitrable.



31. Of course, the lease deed contains arbitration clause and claimant is merely seeking rentals and, in first blush, it may look as if the issue of any such agreement-to-sell is beyond the scope of arbitral proceedings but, on deeper evaluation of the facts, it becomes evident that the facts are so intensely mingled that these cannot be keep apart as the counter-claim is virtually a replica of SoD, with mere addition of prayer clause.

32. According to counter-claimant, it has purchased the first floor on the basis of verbal agreement and has already paid substantial amount towards sale consideration. It has also claimed that all such payments are through banking channels and were towards part sale consideration. These are, in fact, huge and, therefore, it can only be established during arbitral proceedings as to what was the purpose behind such payment, if not towards sale. Of course, there is no agreement in black and white with counter-claimant but then, the counter-claim cannot be rejected merely on that basis outrightly at the very threshold. The onus shall, naturally, be on counter-claimant to prove the execution of any such agreement and the equal onus shall be on the claimant as well to explain as to on what account, it had accepted such huge payments.

33. The lease deed, qua the first floor, is dated 26.03.2021 and the counter claimant is in its possession since much earlier.

34. According to counter-claimant, the execution of lease deed qua the first floor was a mere ploy to get the balance sale consideration. It came



into possession of first floor in 2015 when it desired to expand its business and purchased first floor. The first substantial payment of Rs. 1.5 crore has been made on 19.02.2015 through a demand draft, a fact which cannot be ignored at the moment. Obviously, the lease deed does not contain even a whisper about the same but the stand of counter-claimant is very specific. It claims its ownership rights qua the first floor and thus disputes payment of any kind of rental. In such a situation, the counter-claimant cannot be asked to lodge its counter claim outside the arbitral mode as the same seems to be an integral part of the dispute in question.

35. Any counter-claim may relate to a different cause of action but it can still stem from a primary dispute between the parties. Thus, the governing factor would be to see whether it has any connection with the original dispute or totally isolated and separable one. For all purposes, the counter-claim herein is, directly or indirectly, related to the primary dispute between the parties and the claim in question as well.

36. As per arbitration clause, the parties had agreed to attempt in good faith to resolve 'any disputes/differences or claim arising out of or in relation to this Agreement' and the above phrase is wide enough to take into its ambit the alleged fact of sale of tenanted premises. At the cost of repetition, I would say that it can be established during the proceedings only whether there was any such agreement or not and if yes, whether it



was legally executed and at this initial juncture, such agreement cannot be discarded in a summary manner.

37. Reliance on *Adwel Advertising Service and Another* (supra) is misplaced as therein the subject matter of the dispute were the ‘advertisements on the toilet blocks’ which the SDMC had allotted in public auction to Adwel whereas the subject matter of the ‘equitable set-off claim’ was in respect of a contract for display of ‘advertisement through motor vehicles’ in respect of South Zone for which Adwel sought refund/adjustment of security deposit. It was held that these two transactions did not have any connection and also set apart in time. Consequently, the claim for equitable set-off was held as inapplicable. Reference was also made to *Lakshmichand and Balchand v. State of A.P.*, (1987) 1 SCC 19, wherein the Hon’ble Supreme Court held that when a claim is founded on the doctrine of equitable set-off, all cross-demands should arise out of the same transaction or the demands are so connected in the nature and circumstances that they can be looked upon as a part of one transaction.

38. Thus, if there is a strong interconnectivity or linkage between the two i.e. claim and counter-claim, these can be assumed to be a part of the same transaction.

39. In this case, there is a strong interconnectivity.



40. Facts in *Sunil Kapoor* (supra) were also different. In that case, there were two different suits. Landlord had filed a suit for ejectment and recovery of mesne profits from his tenant. However, prior to the institution of such suit filed by the landlord, his such tenant had also filed a suit for specific performance of oral agreement-to-sell of the tenanted premises. In the suit for ejectment filed by the landlord, the tenant filed an application under Section 10 of CPC praying therein that since he had already filed a suit for specific performance and since the common question of law and fact had arisen even in the subsequent suit for ejectment, such suit for ejectment may be stayed till adjudication of his suit for specific performance. This Court, in the aforesaid peculiar facts, came to the conclusion that there was no reason to stay the proceedings in the ejectment suit. Evidently, the aforesaid judgment does not come to the rescue of claimant herein as there is nothing to indicate in the said judgment that in such a situation, the other suit filed by the tenant, which was prior in time, was not maintainable. The fact whether agreement to sell, which is oral in nature can create enforceable right, is not to be looked into at this stage.

41. No real advantage can be dug out from *Asman Investments Ltd.* (supra) as therein the observations had been made after comprehensive trial. It was only after the evidence was adduced by the parties that this Court did not deem it proper to exercise its discretion to grant a decree for specific performance on the ground that the concerned party failed to



prove its readiness and willingness to perform the contract. In the case in hand, the counter-claim has merely been lodged and is yet to be tested as the evidence is still to be led.

42. Taking note of the peculiar facts and circumstances of the case and after taking a holistic approach of the facts which are so profusely intermingled, it cannot be said that the counter-claim is beyond the realm of primary dispute in question. Undoubtedly, any such respondent has a right to file counter-claim in terms of Section 23 A&C Act and keeping in mind the averments made by the counter-claimant in his SoD as well as in the counter-claim, such counter-claim is maintainable and falls within the scope of Clause 6 of the lease agreement, being in relation to such agreement. Even otherwise, learned Sole Arbitrator, while considering the statement of defence, is bound to take a call with respect to the alleged agreement to sell and the evidence is going to be common in context of such SoD and counter-claim, there is no reason to not entertain the counter-claim.

43. Moreover, as rightly observed by the learned Sole Arbitrator, it would unnecessarily lead to the multiplicity of the proceedings. Admittedly, agreement-to-sell and lease agreement are two separate transactions but in the present case, even before the execution of lease deed, counter-claimant was in possession of the first floor and had made substantial payment towards sale of the same floor and such aspect cannot be overlooked at such initial juncture of the case. Moreover, this is

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not the stage either to label the lease-agreement as a fictitious and sham document or for that matter, the agreement-to-sell as inadmissible one or non-existent. These are subject matters of trial. The only aspect which needs to be evaluated at this stage is whether the counter-claim is within the competence of the learned Sole Arbitrator seized with the dispute in question and I have no hesitation in holding that counter-claim needs to be considered in order to reach just and fair resolution to the existing disputes between the parties.

44. Consequently, it will be travesty of justice if the counter-claim is not entertained and the counter-claimant is rather asked to knock the doors of a civil court.

45. Viewed thus, I do not find any substance in the present petition. Same is accordingly dismissed.

46. Needless to say, learned Sole Arbitrator shall not feel prejudiced by any of the observation appearing in the above order and would deal with the claim and counter-claim in accordance with law.

(MANOJ JAIN)
JUDGE

AUGUST 21, 2024/dr

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